STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED April 8, 2003
v	No. 236728 Wayne Circuit Court
JERRY L. HEARN, Defendant-Appellee.	LC No. 01-001158

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 240021 Wayne Circuit Court
JERRY L. HEARN, Defendant-Appellant.	LC No. 01-001158-01

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

In Docket No. 240021, defendant appeals as of right his bench trial conviction of possession with intent to deliver 225 grams or more but less than 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(ii). On August 13, 2001, the trial court sentenced defendant to nine to thirty years in prison for the conviction. In Docket No. 236728, the prosecutor appeals defendant's sentence and argues that the trial court abused its discretion by sentencing defendant below the statutory minimum sentence of twenty years in prison. We affirm in part, vacate in part, and remand for resentencing.

I. Facts

On December 7, 2000, at approximately 8:00 p.m., Detroit Police Officers Vaughn Watts and Carmen Diaz were patrolling a neighborhood in Detroit in a marked squad car. Defendant drove past the officers in a 1999 Dodge Neon and Officer Watts observed that defendant was not wearing a seatbelt and was driving too fast for the slippery road conditions. The officers followed defendant as he drove down several streets and, as defendant drove down Lawton

Street, Officer Watts saw defendant throw two plastic baggies out of his car window. Officer Watts drove past the bags and observed that they contained a white, powdery substance. Defendant turned onto West Davison and Officer Watts followed and activated his overhead lights. Defendant pulled into a gas station and the officers placed him under arrest. Within three to five minutes, the officers returned to Lawton Street and recovered the baggies. Later testing revealed that the baggies contained 250.38 grams of cocaine.

II. Analysis

A. Ineffective Assistance of Counsel

Defendant contends that defense counsel was ineffective for introducing evidence against him during his cross-examination of Officer Carmen Diaz. We disagree.

Because defendant failed to move for a new trial or an evidentiary hearing, his claims are not preserved and our "review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002), citing *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Further, "[a] defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Ortiz, supra* at 311, citing *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

During his cross-examination of Officer Vaughn Watts, defense counsel raised questions regarding a consent search Officers Watts and Diaz performed at defendant's home shortly after his arrest:

> *Q*. Okay. All right. Whatever you call it. And then you searched the whole premises and everything without the warrant; is that right?
>
> *A*. We were allowed into the house by the brother and the father.
>
> *Q*. Now, anyway, you searched the whole house, didn't find any narcotics; is that right?
>
> *A*. I don't know what parts of the house was [sic] searched; I didn't.

The prosecutor objected twice to the line of questioning and argued that the search was not relevant to the disputed issues at trial. The trial court overruled the objection and reasoned that the evidence was relevant to assess the credibility of Officer Watts. Notwithstanding this ruling, defense counsel thereafter pursued a different line of questioning.

Defense counsel raised the issue of the search again during his cross-examination of Officer Diaz:

Q. You looked at the house, you searched the whole premises; you didn't find anything, did you?

A. Actually we did find something.

Q. Your partner -- okay. What did you find?

A. It was an empty kilo wrapper.

Q. A kilo wrapper; is that something you put money in?

A. It's a kilo wrapper. It's a folding wrapper, the paper with cocaine residue.

Q. Because your partner never said that. I guess he was looking for real narcotics, wasn't he? But you didn't find any actual narcotics in the house, did you?

A. No.

As noted, the trial court allowed defense counsel to question the witnesses about the search to examine the credibility of the witnesses. Our review of the record indicates that defense counsel's questions to Officer Diaz constitute a strategic attempt to undermine the credibility of the officers. The questioning reveals that, though both officers participated in the search of the house, Officer Watts testified that he did not find any narcotics at the home while Officer Diaz testified that they found a paper containing cocaine residue. As defense counsel emphasized, the testimony of the officers conflicted regarding what they uncovered during the search. While, arguably, Officer Diaz' reference to the kilo wrapper may have been unexpected, the fact that defense counsel's chosen strategy ultimately failed does not constitute ineffective assistance of counsel. *People v Williams*, 240 Mich App 316, 332; 614 NW2d 647 (2000). Further, it is well-settled that "[t]his Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy, and ineffective assistance of counsel will not be found merely because a strategy backfires." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (2000).

Defendant has also failed to demonstrate that any alleged error creates a "reasonable probability that the result of the proceeding would have been different" or "that the result of the proceeding was fundamentally unfair or unreliable." *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). "The elements of the charge of possession with intent to deliver cocaine . . . are as follows: (1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between [225 grams and 650] grams." *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). The prosecutor clearly proved these elements by showing that (1) defendant threw two baggies out of his car window as the officers followed him in a marked police car, (2) the baggies contained 250.38 grams of cocaine, and (3) the quantity of cocaine in defendant's possession was large enough for the trier of fact to infer an intent to deliver. *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). While Officer Diaz' recollection of a kilo wrapper inside defendant's house tangentially suggested that defendant knowingly possessed cocaine, other ample evidence of the events leading to his arrest secured

his conviction. Accordingly, defendant has not shown that, but for an error by defense counsel, the outcome of the trial would have been different.

We also reject defendant's claim that he was denied the effective assistance of counsel because counsel failed to cross-examine Officer Watts regarding his transfer out of the Detroit Police Narcotics Unit. During his cross-examination, defense counsel asked Officer Watts about his transfer from the Narcotics Unit to the Notification and Control Unit. Over the prosecutor's objection, the trial court ruled that defense counsel could inquire about the reassignment to explore Officer Watts' character for truthfulness or untruthfulness. However, defense counsel did not question Officer Watts further on the matter.

The trial court emphasized in its findings of fact that, notwithstanding the incident allegedly giving rise to Officer Watts' demotion and its impact on his character for truthfulness, Officer Watts' testimony regarding the events in this case were repeatedly and thoroughly corroborated by Officer Diaz. Therefore, and contrary to defendant's assertions on appeal, trial counsel raised a question regarding Officer Watts' veracity which the trial court considered, but ultimately rejected. Accordingly, the record reflects that defense counsel introduced the alleged demotion, and his decision not to delve into all of the surrounding details was a matter of trial strategy which we will not second-guess on appeal; defendant has not established his claim of ineffective assistance of counsel.[1] *Williams, supra* at 332.

B. Sentence

The prosecutor argues that the trial court abused its discretion by sentencing defendant below the minimum guidelines range. We agree.

"We review for an abuse of discretion the trial court's decision that objective and verifiable factors constitute substantial and compelling reasons for departing from the guidelines' recommended minimum sentence." *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001). Under MCL 769.34(2), "[t]he court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is permitted." *Id*. at 425. "The court may depart from the guidelines if it 'has a substantial and compelling reason for that departure and states on the record the reasons for departure.' " *Id*., quoting MCL 769.34(3).

At defendant's sentencing hearing, the trial court set forth its reasons for imposing a sentence below the statutory guidelines range:

---

[1] Defendant's unpreserved claim that the trial court violated his due process rights because it shifted the burden of proof is equally meritless. While "shifting the burden of proof or persuasion on an element of the crime charged violates due process," nothing in the record suggests that the trial court transferred this burden to defendant. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). Defendant apparently takes issue with the trial court's finding of fact that "because of the quantity of the cocaine, it is not even possibly a user amount . . . ." However, it is well-settled that a trier of fact may infer an intent to deliver from the quantity of cocaine in a defendant's possession. *Wolfe, supra* at 524. Defendant fails to further explain how the trial court's finding imposed an impermissible burden of proof on him. Accordingly, we decline to address the issue further.

> Now, clearly the court has reviewed the pre-sentence report, and you have every ability to work and be a productive member of society. Eleven years ago you had a drug conviction, and you have a job. You had a full-time job, and for some reason, money or whatever, after serving quite a bit of time, you have another conviction of the exact same offense. Other than that, you have nothing.
>
> It's difficult for the court to image [sic] that ten years rather than 20 years is going to make a difference, as far as in changing your view; whether you are going to be 66 or 55 when you get out. I hope that either that amount of time will emphasize to you that that's a mistake. You're not going to get rich quick by putting drugs out in society. And look at all the people that are hurt, plus having tax payers pay for 20 years.
>
> Rather than the guidelines range which starts at nine years -- I really don't see that that would make a difference; it's a large amount of punishment that you took on yourself by taking that huge risk. Either way, you don't have any assaultive offenses. You have worked. Other than the one offense eleven years ago, you have a clear record.
>
> For that reason, I do think that there are substantial and compelling reasons that the tax payers shouldn't have to pay for 20 years, and you should get a chance to get out before your life is over; which this is pretty much a life sentence, if were you [sic] to be given the entire statutory sentence.

The trial court also completed a departure evaluation form in which it stated the following reasons for departure:

> Defendant had 1 prior drug conviction 11 years ago. He is 46 yrs old and employed full time consistently. His sentence is consecutive. He has had no assaultive charges. I believe that it is in the best interest of society and the defendant that he serve till his mid fiftys [sic] rather than sixtys [sic].

For those reasons, the trial court declined to impose the statutory minimum sentence of twenty years in prison and sentenced defendant to a minimum of nine years in prison. MCL 333.7401(2)(a)(ii).

The prosecutor argues that the only objective and verifiable factor on which the trial court relied, defendant's work history, does not constitute a substantial and compelling reason for departure. We review whether a citied factor is objective and verifiable as an issue of law. *People v Johnson*, 223 Mich App 170, 174 n 2; 566 NW2d 28 (1997). As a preliminary matter, a trial "court's belief that defendant and society would be better served if defendant is treated outside prison" or, as here, let out early, is not an objective and verifiable factor as a matter of law. *People v Babcock*, 250 Mich App 463, 471; 648 NW2d 221 (2002).

The other factors on which the trial court relied, defendant's age, work history and the non-assaultive nature of the offense are objective and verifiable. See *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000). However, the trial court abused its discretion by concluding that these factors justify the downward departure in this case. First, that the crime of possession with

intent to deliver does not involve an assault is already taken into account by the offense variables. Because the crime is not a crime against a person or a property crime, the Legislature has designated it as part of the "controlled substance" crime category. MCL 777.13m. Under MCL 777.22(3), for controlled substance offenses, the trial court was required to score offence variable 3, physical injury to a victim. The trial court correctly scored OV 3 at zero points because "[n]o physical injury occurred to a victim." MCL 777.33(f). Therefore, the absence of a physical assault was an offense characteristic already taken into account in determining the appropriate guidelines range. See MCL 769.34(3)(b). Because the trial court failed to find that this factor was given inadequate weight under the guidelines, its reliance on this factor was misplaced.

Further, the trial court's reliance on defendant's age as a reason for departure is inconsistent with its reasoning at the sentencing hearing, in which the court observed, "It's difficult for the court to image [sic] that ten years rather than 20 years is going to make a difference, as far as in changing your view; whether you are going to be 66 or 55 when you get out." The trial court specifically stated that the length of sentence and defendant's age at the time of release will not "make a difference." Moreover, defendant's age and work history simply do not constitute "substantial and compelling" reasons for departure. As the prosecutor notes, "substantial and compelling reasons exist only in exceptional cases and . . . the reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence." *Babcock, supra* at 466-467, citing *People v Fields*, 448 Mich 58, 67-68; 528 NW2d 176 (1995). Defendant's age, forty-six, offers no substantial or compelling basis for lowering his sentence from twenty years in prison to nine years in prison, and evidence that defendant held a job when he committed this crime simply does not place defendant in the category of "exceptional cases" to justify a departure. Because the trial court did not set forth a substantial or compelling reason for departing from the statutory minimum sentence, we must remand this case for resentencing. MCL 769.34(11).

For these reasons, we affirm defendant's conviction, vacate defendant's sentence, and remand for resentencing. We do not retain jurisdiction.[2]

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

[2] We recognize that the statute under which defendant was originally sentenced has been materially amended since the date of defendant's original sentence. We express no opinion whether defendant should be sentenced under the amended statute or the statute as it was written on the date of defendant's original sentence.